



STATE OF CALIFORNIA—DEPARTMENT OF PUBLIC WORKS
DIVISION OF WATER RESOURCES
STATE ENGINEER

License for Diversion and Use of Water

APPLICATION 2615

PERMIT 2538

LICENSE 3987

THIS IS TO CERTIFY, That Walker River Irrigation District
Yerington, Nevada

has made proof as of July 21, 1953
(the date of inspection) to the satisfaction of the State Engineer of California of a right to the use of the water of
an unnamed stream in Mono County

tributary to Topaz Lake (Formerly Alkali Lake)

for the purpose of irrigation and domestic uses
under Permit 2538 of the Department of Public Works and that said right to the use of said water has
been perfected in accordance with the laws of California, the Rules and Regulations of the Department of Public Works
and the terms of the said permit; that the priority of the right herein confirmed dates from October 28, 1921;
and that the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited
to the amount actually beneficially used for said purposes and shall not exceed two hundred (200) acre-
feet per annum by storage to be collected from January 1 to December 31 of each year.

The point of diversion to storage of such water is located north one thousand
fifty (1050) feet and west one thousand six hundred eighty (1680) feet from SE
corner of Section 27, T 10 N, R 22 E, MDB&M, being within SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of said Section
27.

North end of impounding embankment lies at NE corner of Section 2, T 9 N, R 22 E,
MDB&M, being within NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of said Section 2.

Point of diversion from storage (Tunnel) lies south forty-four degrees twenty-
four minutes west (S44°24'W) nine hundred sixty-eight and eight tenths (968.8) feet
from NE corner of Section 33, T 10 N, R 22 E, MDB&M, being within NE $\frac{1}{4}$ of NE $\frac{1}{4}$
of said Section 33.

Points of re-diversion of stored waters are at intakes of forty (40) small
existing ditches on lands of the District diverting from the river as shown on the
general map.

A description of the lands or the place where such water is put to beneficial
use is as follows: a net area of 79174 acres within a gross area of 132573 acres
being within the boundaries of Walker River Irrigation District, as shown on map
filed with State Engineer.

All rights and privileges under this license including method of diversion, method of use and quantity of water
diverted are subject to the continuing authority of the Department acting through the State Engineer in accordance
with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or
unreasonable method of diversion of said water.

Reports shall be filed promptly by licensee on appropriate forms which will be provided for the purpose from time
to time by the State Engineer.

The right hereby confirmed to the diversion and use of water is restricted to the point or points of diversion herein
specified and to the lands or place of use herein described.

This license is granted and licensee accepts all rights herein confirmed subject to the following provisions of the Water Code:

Section 1625. Each license shall be in such form and contain such terms as may be prescribed by the Department.

Section 1626. All licenses shall be under the terms and conditions of this division (of the Water Code).

Section 1627. A license shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code) but no longer.

Section 1628. Every license shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a license is issued takes the license subject to the conditions therein expressed.

Section 1629. Every licensee, if he accepts a license does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any license granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any licensee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any licensee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Section 1630. At any time after the expiration of twenty years after the granting of a license, the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State shall have the right to purchase the works and property occupied and used under the license and the works built or constructed for the enjoyment of the rights granted under the license.

Section 1631. In the event that the State, or any city, city and county, municipal water district, irrigation district, lighting district, or political subdivision of the State so desiring to purchase and the owner of the works and property can not agree upon the purchase price, the price shall be determined in such manner as is now or may hereafter be provided by law for determining the value of property taken in eminent domain proceedings.

Witness my hand and the seal of the Department of Public
Works of the State of California, this 5th
day of August, 19 54

A. D. EDMONSTON, State Engineer

By Harvey O. Banks
HARVEY O. BANKS
Assistant State Engineer



LICENSE 3987

STATE OF CALIFORNIA—DEPARTMENT OF PUBLIC WORKS
DIVISION OF WATER RESOURCES
STATE ENGINEER

LICENSE
TO APPROPRIATE WATER

ISSUED TO Walker River Irrigation District

DATED

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER

APPLICATION 2615

PERMIT 2538

LICENSE 3987

ORDER AMENDING LICENSE

WHEREAS:

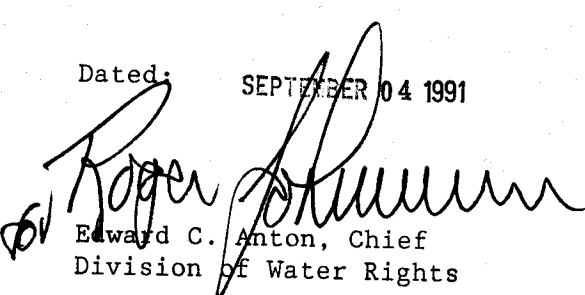
1. License 3987 was issued to Walker River Irrigation District and was recorded with the County Recorder of Mono County on August 24, 1954.
2. The place of use described in License 3987 is located within the State Department of Fish and Game, District 4½. The license was issued after the effective date of the Department of Fish and Game Code Section 5946. The license should have been coordinated to meet that code section.
3. At Board Meeting held on July 21, 1990, the Board determined that License 3987 should be amended to include a special condition requiring the licensee to comply with Section 5937 of the Fish and Game Code.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The following condition is added to this license:

In accordance with the requirements of Fish and Game Code Section 5946, this license is conditioned upon full compliance with Section 5937 of the Fish and Game Code.

Dated: SEPTEMBER 04 1991


Edward C. Anton, Chief
Division of Water Rights

L 348

Licensee.

COUNTY: Mono

11

3.0

THE FAIR HEARING GROUNDS

District alleges that it was prevented from having a fair hearing because it was not allowed to present evidence on two questions: (1) whether the appropriative water rights evidenced and confirmed by the licenses vested before September 9, 1953, the effective date of Fish and Game Code Section 5946; and (2) what stream flows associated with these licenses are necessary to keep fish in good condition.

3.1

The Vested Rights Question

The Board's predecessor issued water right permits to the District which authorized it to divert and reasonably and beneficially use waters of the East Walker River and the West Walker River. These permits underlie the water right licenses at issue herein. There is no material dispute over the timing and amounts of District's beneficial use of water pursuant to its permits; these facts are matters of record.¹ Accordingly, no evidentiary hearing is required to establish the timing and amount of District's water use. The issue is one of law.

3.1.1 As authority for the action taken in Order WR 90-9, the Board relied upon two recent California appellate court

¹ These facts are shown by the Board's records associated with the District's water right applications in the form of periodic reports of water use filed by the District. No reason exists to challenge the veracity of these reports at this late date and no party has done so.

decisions which dealt explicitly with the scope of the Board's duty to implement Fish and Game Code Section 5946 with respect to water right entitlements issued in Fish and Game District 4 1/2. These decisions are California Trout, Inc. v. State Water Resources Control Board, 207 Cal.App.3d 585, 255 Cal.Rptr. 184 (1989) (hereinafter "Cal-Trout I"); and California Trout, Inc. v. Superior Court, 218 Cal.App.3d 187, 266 Cal.Rptr. 788 (1990) (hereinafter "Cal-Trout II").

- 3.1.2 District has presented its position on this issue in a letter sent to the Chief, Division of Water Rights, prior to the Board's adoption of Order WR 90-9. (Letter dated June 1, 1990, from Alan B. Lilly to Walter G. Pettit, subject: "Complaint by California Trout, Inc. Against Walker River Irrigation District Regarding East Walker River, Mono County".) We do not agree with District's legal argument on the issue. District argues that an important factual distinction exists between the license at issue in the Cal-Trout cases and the licenses under consideration here. In the Cal-Trout cases the court found that the licensee had not perfected its appropriation until many years after enactment of Section 5946. In contrast, it is argued, the District applied its full appropriations to

beneficial use well before enactment of Section 5946. Therefore, the District concludes, Section 5946 cannot be applied in this case without improperly and retroactively infringing on its vested water rights.

3.1.3 Although Cal-Trout I discussed the timing of the build-up in the licensee's utilization of water under its appropriation, that language appears in the context of an arguendo discussion. The court concluded that consideration of licensee's retroactive application argument would not produce a result more favorable to the licensee; the court did not hold that if water is put to use before 1953, Section 5946 would not apply to a license issued after 1953. The actual holding in Cal-Trout I is found in the following language:

"As related, the history of the section strongly suggests that section 5946 is meant to be applied to all projects of appropriation in District 4 1/2 that had not proceeded to license status prior to its effective date." (207 Cal.App.3d 585, 608.)

This point was confirmed in Cal-Trout II. There, the court observed:

"Hence, the appropriator can be compelled as the price of continued appropriation to take reasonable steps to attain the same end [i.e., restoration of creeks and fisheries] in a manner that does not involve unreasonable use of water." (218 Cal.App.3d 187, Fn. 6; emphasis added.)

- 3.2 Quantified Criteria for Compliance With Section 5937
District poses the question, also on the grounds of fair hearing denial, of what stream flows associated with these licenses are necessary to keep fish in good condition? We have two responses.
- 3.2.1 First, Cal-Trout II clearly holds that the Board is not to delay compliance with Fish and Game Code Section 5946 pending development of quantified criteria. (218 Cal.App.3d 187, passim.)
- 3.2.2 Second, the Board is proceeding to develop quantified criteria. With regard to License 9407 (Bridgeport Reservoir), on July 26 and 27, 1990, the Board held a hearing on a complaint by California Trout, Incorporated, against the District's operations. The goal of that hearing was development of an order prescribing specific criteria for implementing the general requirement of Fish and Game Code Section 5937 that the fish below Bridgeport Dam be kept in good condition. An order proposing adoption of such criteria is expected to be presented for our consideration at the same Board Meeting at which the instant order will be considered.

We will proceed diligently to develop such specific criteria for the Topaz Lake licenses as well as other water right entitlements issued in District 4 1/2.

4.0

THE ERROR IN LAW GROUNDS

District's other contention is that the Board erred by not including certain additional language in the condition ordered added to the subject licenses by Order WR 90-9.

4.1

The first additional sentence that District would have us add is as follows:

The licensee shall release sufficient water into the streams from its dams to reestablish and maintain the fisheries which existed in them prior to its diversion of water.

District notes that the Court of Appeal's decision in Cal-Trout II, supra, directed the Board to include that sentence in the condition of the licenses under consideration by the Court in that case. District argues that "if the State Board is going to follow the Court of Appeal's directions on one sentence, then it also should follow those directions on the other sentence." We decline to add the requested sentence.

4.1.1

In Cal-Trout II, the court had before it a record which led it to conclude that restoration of the pre-project fishery was the correct implementation of Section 5937 on the facts of that case. Section 5937 also permits, under appropriate circumstances, an alternative

4.2 Finally, District would also have us add the following sentence:

In the case of a reservoir, this condition shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir.

In support of this request District notes that the language of a Board rule (23 Calif. Code of Regs 782) includes the requested qualification of the general condition.

4.2.1 While the rule does include that qualification, the rule is not applicable to this case. It applies only to permits issued after the regulation was adopted in 1975. (See 57 Ops.Cal.Atty.Gen. 557, 580 (1974).) Moreover, by the terms of the rule, the language that District would have us add applies only when the Board does not set a more specific provision for protection of fish. The rule cannot be understood as adopting an interpretation of Section 5937 that releases in excess of concurrent inflows to the reservoir are never required.

4.4.2 We cannot accept an interpretation of Section 5937 which in no case would allow compliance through releases which may exceed concurrent inflows to the reservoir at certain times of the year, because such an interpretation would be inconsistent with the rule

implementation which would require the dam owner to keep in good condition any fish "that may be planted" below the dam.² As is apparent from our related proceeding on License 9407 (Bridgeport Reservoir), the goal of implementing Section 5937 therein is not restoration of a pre-project fishery but maintenance of a highly valued fishery consisting most importantly of an introduced, and periodically restocked, species.³ As noted above, we will address in our order in the related proceeding the specific criteria for implementing Section 5937 in License 9407. Accordingly, we decline to adopt the general language proposed by the District.

- 4.1.2 As for Licenses 3987 and 6000 (Topaz Lake), at this time we have no record upon which to determine whether additional implementing language is necessary, and, if it is, what the thrust of that language should be. Accordingly, we conclude that it would be inappropriate to add the requested sentence.

² Fish and Game Code Section 5937 provides in pertinent part:

The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.

³ There may be other situations where the language suggested by District would be inappropriate. For example, if the pre-project fishery had been impaired by pollution or illegal diversions, and these problems have been corrected, a dam owner's duties under Section 5937 should not be limited to maintenance of the pre-project fishery.

2. This Order shall constitute the Board's final action on the
Petition for Reconsideration.

CERTIFICATION

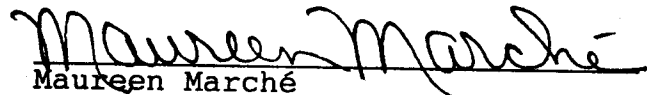
The undersigned, Administrative Assistant to the State Board,
does hereby certify that the foregoing is a full, true, and
correct copy of an order duly and regularly adopted at a meeting
of the State Water Resources Control Board held on November 7,
1990.

AYE: W. Don Maughan
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: Darlene E. Ruiz

ABSTAIN: Edwin H. Finster


Maureen Marché
Administrative Assistant
to the Board

favoring a physical solution to promote maximum beneficial use of water. (See City of Lodi v. East Bay Municipal Util. Dist., 7 Cal.2d 316, 60 P.2d 439 (1936).) For example, in a particular case, there may be two ways of maintaining fish in good condition. One flow regime may require very high winter and spring flows but allow for very low summer flows, with flows never exceeding natural levels. Another flow regime may allow storage of large volumes, and moderate stream flows, in the winter and spring, with higher than natural flows in summer.⁴ Under the District's interpretation, the Board would have to adopt the former flow regime, even if the latter provided equal protection for fish and allowed more water to be diverted and used for other purposes. Such an interpretation would be inconsistent with Article X, Section 2, of the Constitution. Accordingly, District's request to add the above-quoted qualification to the condition ordered added to the subject licenses by Order WR 90-9 should be denied.

ORDER

1. The relief sought by District in its Petition for Reconsideration is denied.

⁴ We do not, by stating this example, imply that it is necessarily applicable to the operation of Bridgeport Reservoir pursuant to License 9407.

23787

Licensee.

COUNTY: Mono

for reconsideration urged by Petitioner are that it was prevented from having a fair hearing and error in law. (23 Code of Calif. Regs. 768(a), 768(d).)

3.0

RELATED PROCEEDING

Subsequent to the filing of the Petition for Reconsideration of Order WR 90-9, the Board on July 26 and 27, 1990, conducted a hearing in a closely related proceeding. This related proceeding, "Complaint by California Trout, Inc., against Walker River Irrigation District", has as its principal goal development of an order which will prescribe specific criteria (which may be interim criteria) for implementing the narrative requirement of Fish and Game Code Section 5937, viz., that the fishery below Bridgeport Dam be kept in good condition. Bridgeport Dam is a project work covered by water right License 9407 (Application 1389), one of the three licenses amended by Order WR 90-9.

4.0

THE PETITION SHOULD BE GRANTED SO THAT A CONSOLIDATED ORDER MAY BE ADOPTED

The petition raises issues which should be addressed by the Board in an order. However, principles of efficiency and clarity support consideration of the issues raised by the petition at the same time the Board considers the issues raised by the closely related proceeding identified in the preceding

provided, that granting said petition implies no determination on the merits thereof. The amendments to water right licenses made by Order WR 90-9 shall remain in full force and effect pending further order of the Board.

CERTIFICATION

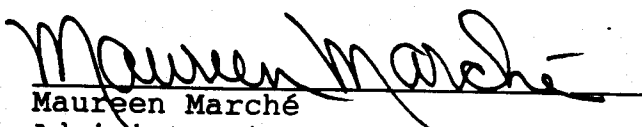
The undersigned, Administrative Assistant to the State Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 5, 1990.

AYE: W. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: Darlene E. Ruiz

ABSTAIN: None


Maureen Marché
Administrative Assistant
to the Board

paragraph. Orders in both proceedings will be considered for adoption by the Board at its October 1990 Board Meeting. Accordingly, the petition should be granted to permit the Board to address these issues at the same time it considers the issues raised in the related proceeding.

5.0

GRANTING RECONSIDERATION IMPLIES NO DETERMINATION OF THE MERITS OF PETITIONER'S ARGUMENTS

The purpose of granting the petition is to enable the Board to consider the issues raised therein together with the issues involved in the related proceeding. Granting the petition implies no determination on the merits thereof.

6.0

PREVIOUS LICENSE AMENDMENTS SHOULD REMAIN IN EFFECT

To comply with the mandate of Fish and Game Code Section 5946 and to continue in effect a water right enforcement remedy for protection of the fish below Bridgeport Dam, the water right license amendments made by Order WR 90-9 should remain in full force and effect pending further order. (See California Trout, Inc. v. State Water Resources Control Board, 218 Cal.App.3d 187 (1990).)

ORDER

IT IS HEREBY ORDERED that the Petition for Reconsideration filed by Licensee Walker River Irrigation District be granted;

4510

In the Matter of Licensed
Applications 1389, 2221, and
2615

ORDER: WR 90-9

SOURCE: East Fork Walker
River, and West
Fork Walker River

COUNTY: Mono

BY THE BOARD:

INTRODUCTION

2.0 DESCRIPTION OF PROJECTS

The Walker River Irrigation District (District) has a licensed water right to appropriate water from the East Fork Walker River. (License 9407, issued on Application 1389.) Application 1389 was filed on August 8, 1919 and, following extensions of time

requested by the District to complete use of water (Water Code Section 1398), License 9407 was issued on June 30, 1970. The District also holds licensed rights to appropriate water from the West Fork Walker River and a tributary source. (License 3987, issued on Application 2615, and License 6000, issued on Application 2221.) Application 2615 was filed on October 28, 1921 and, following extensions of time requested by the District, License 3987 was issued on August 5, 1954. Application 2221 was filed on February 2, 1921 and, following extensions of time requested by the District, License 6000 was issued on February 11, 1960. All licenses confirm the District's rights to the appropriation of water for domestic and irrigation purposes.

3.0

COMPLIANCE WITH FISH AND GAME CODE SECTION 5946

Fish and Game Code Section 5946 provides in relevant part as follows:

"No permit or license to appropriate water in District 4 1/2 shall be issued by the State Water Resources Control Board after September 9, 1953, unless conditioned upon full compliance with [Fish and Game Code] Section 5937."

Fish and Game Code Section 5937 requires the owner of any dam to allow water at all times to pass through a fishway, or in the absence of a fishway, to pass over,

around or through the dam, sufficient to keep in good condition any fish that may be planted or exist below the dam. In California Trout, Inc. v. State Water Resources Control Board (218 Cal.App.3d 187 (1990)), the State Board was directed to exercise its ministerial duty to condition the licenses of the City of Los Angeles for appropriation of water in District 4 1/2 in compliance with the requirements by Fish and Game Code Section 5946.

- 3.1 By letter dated May 17, 1990, California Trout Inc. (Cal Trout), requested that the District's license to appropriate water from the East Fork Walker River at Bridgeport Reservoir be conditioned on compliance with Fish and Game Code Section 5946. Cal Trout requested that the State Board perform this "non-discretionary" duty without delay.
- 3.2 All of the District's rights to appropriate water in District 4 1/2 have been reviewed and the Board concludes that it is appropriate to condition all of the District's licenses within District 4 1/2 in compliance with Section 5946 of the Fish and Game Code.
- 4.0 **CONCLUSION**
- A review of the licenses held by the District indicate that the appropriations confirmed by said licenses are

located within District 4 1/2, and that the licenses were issued after the effective date of Fish and Game Code Section 5946 without the condition required by the section. Accordingly, the licenses should be amended in compliance therewith.

ORDER

IT IS HEREBY ORDERED that water right Licenses 3987, 6000, and 9407 be amended to include the following additional condition:

"In accordance with the requirements of Fish and Game Code Section 5946, this license is conditioned upon full compliance with Section 5937 of the Fish and Game Code."

CERTIFICATION

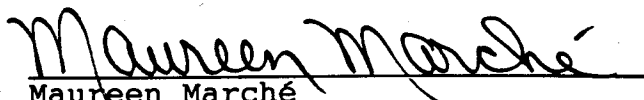
The undersigned, Administrative Assistant to the State Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 21, 1990.

AYE: W. Don Maughan
Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant
to the Board